IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

OMAR CARAVEO,	§	
	§	
Petitioner,	§	
	§	
v.	§	No. 4:13-CV-522-A
	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION
and
ORDER

This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by petitioner, Omar Caraveo, a state prisoner incarcerated in the Correctional Institutions Division of the Texas Department of Criminal Justice (TDCJ), against William Stephens, Director of TDCJ, Respondent. After having considered the pleadings, state court records, and relief sought by petitioner, the Court has concluded that the petition should be denied.

I. Procedural History

On February 25, 2009, in the 415th District Court of Parker County, Texas, Case Nos. CR08-0502 and CR08-0503, a jury found petitioner guilty of burglarizing the habitations of Carol Parish

and Rebecca Smith, petitioner pleaded true to the sentencing-enhancement allegation in the indictments, and the jury assessed his punishment in each case at sixty years' imprisonment and a $10,000 fine. Admin. R., SH4a - writ WR-75,114-03, 150, ECF No. 17-5; SH4a - writ WR-75,114-04, 150, ECF No. 17-7. Petitioner appealed his convictions, but the Eleventh Court of Appeals of Texas affirmed the trial court's judgments in Nos. 11-09-000082-CR and 11-09-00083-CR. Mem. Op. 5, ECF No. 11-11. Petitioner also sought postconviction state habeas relief, to no avail.

The appellate court summarized the facts of the case as follows:

> Parish testified that someone forcibly entered her home and unattached garage in Aledo while she was away at work on May 13, 2008. Various items of lawn equipment and her boyfriend's battery charger were stolen from her garage, and electronic equipment was stolen from inside her home.
>
> Smith testified that someone broke into her home in Aledo on May 15, 2008. The person that broke into her home stole various items of electronic equipment and other items of value. A bicycle that she had recently purchased for her daughter and a pair of binoculars were also stolen.
>
> Robert Moore, an investigator in the Parker County Sheriff's Office, testified that he entered the serial number for the girl's bicycle stolen from Smith's house into a computer service known as "LeadsOnline" that permits law enforcement officers to search identifying information submitted by pawn shops in Texas with regard to pawned property. His search on LeadsOnline

> indicated that the bicycle had been pawned at a Cash America Pawn Shop in Fort Worth on May 19, 2008. His subsequent investigation revealed that appellant pawned the bicycle at the Cash America Pawn Shop along with a pair of binoculars, a battery charger, and a toolbox. Smith positively identified the bicycle and binoculars as being items stolen from her home, and Parish and her boyfriend positively identified the battery charger as being the battery charger stolen from her home.
>
> Ricky Cajero is an employee of the Cash America Pawn Shop where the stolen items referenced above were pawned. He testified that he waited on appellant when he pawned the items on May 19, 2008. He positively identified appellant as the person that pawned the items.

Mem. Op. 2, ECF No. 11-11.

II. Issues

Petitioner raises the following grounds for habeas relief (all spelling, grammatical and punctuation errors are in the original):

(1) "The court of appeals, errored in rejecting Caraveo's challenge to the sufficiency of the evidence in reliance on an inference which was not before the jury for consideration.

(2) "The court of appeals, errored in rejecting Caraveo's challenge to the sufficiency of the evidence by applying an evidentiary rule which allows an inference of guilt based on the accused having invoked his right not to testify.

(3) "The court of appeals, errored in rejecting Caravel's challenge to the sufficency of the evidence by applying an inference which was never before the jury for consideration.

(4) "The court of appeals, errored in its determination that the evidence was legally sufficient to establish an essential element of burglary of a habitation, namely entry.

(5) "The court of appeals, errored in its determination that the evidence was legally sufficient to establish an essential element of burglary of a habitation, namely intent.

(6) "Caraveo did not receive effective assistance of counsel at trial.

(7) "Caraveo did not receive a fair trial due to prosecutor's misconduct.

(8) "Caraveo's right to due course of law was violated by trial court's abuse of discretion."

Pet., Attach. 1-9, ECF No. 1. Petitioner's claims are multifarious and addressed as thoroughly as practical below.

III. Rule 5 Statement

Respondent believes petitioner has sufficiently exhausted his state court remedies and that the petition is timely. Resp't's Answer 5, ECF No. 30. 28 U.S.C. §§ 2244(b), (d) & 2254(b).

IV. Discussion

Legal Standard for Granting Habeas Corpus Relief

Under 28 U.S.C. § 2254(d), a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was

adjudicated on the merits in state court proceedings unless he shows that the prior adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court. 28 U.S.C. § 2254(d). A decision is contrary to clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court of the United States on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); *see also Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). A state court decision will be an unreasonable application of clearly established federal law if it correctly identifies the applicable rule but applies it unreasonably to the facts of the case. *Williams*, 529 U.S. at 407-08.

The statute further requires that federal courts give great deference to a state court's factual findings. *Hill*, 210 F.3d at 485. Section 2254(e)(1) provides that a determination of a factual issue made by a state court shall be presumed to be correct. The presumption of correctness applies to both implicit

and explicit factual findings. *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001). Absent express findings of fact, a federal court may assume the state court applied correct standards of federal law to the facts, unless there is evidence that an incorrect standard was applied, and imply fact findings consistent with the state court's disposition. *Townsend v. Sain*, 372 U.S. 293, 314 (1963); *Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir.2003); *Catalan v. Cockrell*, 315 F.3d 491, 493 n.3 (5th Cir.2002). Finally, when the Texas Court of Criminal Appeals denies a federal claim in a state habeas corpus application without written order, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Johnson v. Williams*, 133 S. Ct. 1088, 1094 (2013); *Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011).

Sufficiency of the Evidence

Under grounds one through three, petitioner claims the appellate court erred in rejecting his challenge to the sufficiency of the evidence by (all spelling, grammatical and punctuation errors are in the original)—

(1) "applying an evidentiary rule which permits an

inference of guilt, based on Texas' 'unexplained possession of recently stolen property' doctrine where such doctrine was not an issue which was considered by the fact-finder;

(2) "applying an evidentiary rule which permits an inference of guilt, based on Texas' 'unexplained possession of recently stolen property' doctrine where such doctrine, in its application, tends to 'penalize' a criminal defendant based on the defendant having invoked his substantive constitutional right; and

(3) "applying Texas' 'unexplained possession of recently stolen property' doctrine where such doctrine was not before the jury for consideration because, under the circumstances, it infringes upon a criminal defendant's right to have the jury, rather than a judge, reach the requisite finding of 'guilt.'"

Pet., Attach. 2-3, ECF No. 1.

Under grounds four and five, petitioner claims the appellate court erred in its determination that—

(4) "the evidence was legally sufficient to establish an essential element og Burglary of a habitation, namely entry, where the unexplained possession only raises an inference of guilt, but is not conclusive, and the highly cicumstantial evidence failed to identify Petitioner as the person that entered the burglarized homes as required by law; and

(5) "the evidence was legally sufficient to establish an essential element of Burglary of a Habitation, namely intent, where the unexplained possession only raises an inference of guilt, but is not conclusive, and the highly circumstantial evidence failed to prove that Petitioner acted with intent to commit theft, and/or burglary as required by law."

Id., Attach. 3, ECF No. 1.

In reviewing the sufficiency of the evidence in the context of habeas corpus proceedings challenging the judgment of a state court, a federal court's review is limited to determining whether, based upon the record evidence adduced at trial, no rational trier of fact could have found proof of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). Whether direct or circumstantial, the court's review of the evidence is conducted in the light most favorable to the verdict. *Selvage v. Lynaugh*, 823 F.2d 845, 847 (5th Cir. 1987). The determination of the sufficiency of the evidence by a state appellate court is entitled to great deference. *Callins v. Collins*, 998 F.2d 269, 276 (5th Cir. 1993).

Applying the *Jackson* and state-created *Clewis* standards,[1] and other relevant state statutory and case law, the Eleventh Court of Appeals addressed the legal and factual sufficiency of the evidence as follows:

> To determine if the evidence is legally sufficient, we must review all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable

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[1]The Texas Court of Criminal Appeals has since overruled the factual sufficiency standard in *Clewis* and held that the legal sufficiency stardard in *Jackson* is applicable in determining whether the evidence is sufficient to uphold each element of the offense. *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010).

doubt. To determine if the evidence is factually sufficient, the appellate court reviews all of the evidence in a neutral light. Then, the reviewing court determines whether the evidence supporting the verdict is so weak that the verdict is clearly wrong and manifestly unjust or whether the verdict is against the great weight and preponderance of the conflicting evidence. The finder of fact is the sole judge of the weight and credibility of the witnesses' testimony.

Appellant's legal and factual sufficiency arguments in both cases focus on the application of the well-settled rule that a defendant's unexplained possession of property recently stolen in a burglary permits an inference that the defendant is the one who committed the burglary. We note in this regard that the application of such an inference has been held not to violate the due process requirements of the federal constitution. The State relies upon this inference to establish appellant's guilt for the burglaries of Parish's and Smith's homes.

Appellant contends that the inference is inapplicable to his convictions because there is no evidence that he was asked to give an explanation after the property was discovered and no evidence that he gave such an explanation. He cites *Hood v. State* in support of the proposition. *Hood* appears to suggest that the inference cannot be relied upon if there is no evidence that the defendant was given the opportunity but failed to give a reasonable explanation for his possession of the stolen property. We previously rejected the holdings suggested by *Price [v. State]* and *Hood* in *Foster v. State*. For the reasons set out in *Foster*, we reaffirm our holding that evidence that a burglary was recently committed and that the defendant was in recent possession of property stolen in the burglary, together with no evidence of a reasonable explanation for the defendant's possession of the property given at the time of arrest or at the time he was found to be in possession of the stolen property, is legally and factually sufficient evidence to support the defendant's conviction for burglary.

> The evidence offered at trial established that Parish's and Smith's homes were burglarized and that appellant was in recent possession of items stolen from both homes. Furthermore, there is no evidence of a reasonable explanation for appellant's possession of the items stolen from Parish's and Smith's homes. The inference arising from these facts constitutes legally and factually sufficient evidence of appellant's guilt.

Mem. Op.2-4, ECF No. 11-11 (footnote and citations omitted).

The state court's adjudication of these claims comports with Supreme Court precedent and was reasonable in light of the evidence at petitioner's trial, circumstantial though it is. *Jackson*, 443 U.S. at 319, 324-25. *See also Barnes v. United States*, 412 U.S. 837, 843-46 (1973) (providing inference of guilt from unexplained possession of recently stolen property satisfies the requirements of due process). A white pickup was seen at Parish's house on May 13, 2008, the day of the first robbery, petitioner arrived at the Cash America on May 19, 2008, in a white pickup, Marie Ortega, whose daughter is a friend of petitioner's, saw petitioner driving a "white truck" on or about May 21, 2008, and petitioner was in possession, without any plausible explanation, of items recently stolen during both burglaries. This evidence was sufficient for the jury to infer that petitioner was involved in the burglaries. Permitting such inference does not infringe upon petitioner's privilege against

self-incrimination or his right to due process. *Barnes*, 412 U.S. at 843-47; *Turner v. United States*, 396 U.S. 642, 417-18 (1970).

Nor does the fact that the jury was not charged on the issue entitle petitioner to relief. It is the jury's role to determine the facts upon the evidence under the charge as given. This includes drawing all reasonable inferences that the jury could justifiably draw from the evidence presented at trial. *Jackson*, 443 U.S. at 319. Petitioner's intent and guilt may be reasonably inferred from the circumstantial evidence, which is a function of the jury. It was not necessary that the state court provide an instruction to the jury that the inference was permissible from petitioner's unexplained possession of stolen property. Indeed, the Supreme Court and the Texas Court of Criminal Appeals have both advised against giving such an instruction. *Barnes*, 412 U.S. at 846-47; *Hankins v. State*, 646 S.W.2d 191, 197 (Tex. Crim. App. 1983) (op. on reh'g).

Ineffective Assistance of Counsel

Under his sixth ground, petitioner presents a laundry list of ineffective-assistance-of-counsel claims. Pet., Attach. 3-7, ECF No. 1. A criminal defendant has a constitutional right to the effective assistance of counsel at trial. U.S. CONST. amend. VI, XIV; *Evitts v. Lucey*, 469 U.S. 387, 393-95 (1985); *Strickland*

v. Washington, 466 U.S. 668, 688 (1984). An ineffective assistance claim is governed by the familiar standard set forth in *Strickland v. Washington*. 466 U.S. at 669. To establish ineffective assistance of counsel a petitioner must show (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that but for counsel's deficient performance the result of the proceeding would have been different. *Id.* at 688.

In applying this standard, a court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance or sound trial strategy. *Id.* at 668, 688-89. Judicial scrutiny of counsel's performance must be highly deferential and every effort must be made to eliminate the distorting effects of hindsight. *Id.* at 689. Where a petitioner's ineffective assistance claims have been reviewed on their merits and denied by the state courts, federal habeas relief will be granted only if the state courts' decision was contrary to or involved an unreasonable application of the *Strickland* standard in light of the state court record. *Harrington*, 131 S. Ct. at 785 (quoting *Williams v. Taylor*, 529 U.S. 362, 410 (2000)); *Bell v. Cone*, 535 U.S. 685, 698-99 (2002). The Supreme Court has emphasized-

> The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.

Harrington, 131 S. Ct. 770, 785 (quoting *Williams v. Taylor*, 529 U.S. at 410). Accordingly, it is necessary only to determine whether the state courts' rejection of petitioner's ineffective-assistance claims was contrary to or an objectively unreasonable application of *Strickland*. *Bell*, 535 U.S. at 698-99.

No express findings of fact or conclusions of law were made by the state courts regarding petitioner's claims. The state habeas judge, who also presided over petitioner's trial, merely recommended denial of petitioner's state habeas applications because "there are no disputed issues of fact," petitioner's "claims are not proper claims for habeas corpus relief," and "all of the claims for relief . . . are without relief [sic]." SH4b-con't, 137, ECF No. 17-5; SH5a-writ, WR-75,114-04, 137, ECF No. 17-7. The recommendation was followed by the Texas Court of

Criminal Appeals, which denied relief without hearing or written order. Therefore, this Court assumes the state courts applied the *Strickland* standard to the facts of the case, absent any indication that an incorrect standard was applied, and implies fact findings consistent with the state courts' denial of relief. *Townsend*, 372 U.S. at 314; *Valdez*, 274 F.3d at 948 n.11; *Goodwin v. Johnson*, 132 F.3d 162, 183 (5th Cir. 1997).

Petitioner raises eleven ineffective-assistance claims. In (A), (B) and (C), petitioner claims counsel was ineffective by failing to: investigate and interview Maria Ortega, whose daughter is a friend of petitioner's and who testified that she saw petitioner driving a "white truck" on or about May 21, 2008; investigate and interview Ricardo Cajero, the pawn shop employee; investigate petitioner's pawn history; and investigate the "circumstances surrounding the property hearing."[2] While it is true that an attorney must engage in a reasonable pretrial investigation into the facts of a criminal case, which may include interviewing potential witnesses, the record is silent as to the nature and extent of counsel's investigation and

[2]Apparently, a hearing, pursuant to chapter 47 of the Texas Code of Criminal Procedure, was held in June 2008 to determine the right of possession to the stolen items that were recovered by law enforcement and is referenced by petitioner in his petition as the "property hearing." Pet'r Reply, Ex. B, ECF No. 33; RR, vol. 4, 99-101, ECF No. 12-4.

preparation for trial. *Strickland*, 466 U.S. at 691; *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994). The absence of evidence cannot overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance"—*i.e.*, that counsel conducted a reasonable investigation. *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013) (quoting *Strickland*, 466 U.S. at 687). Moreover, during cross-examination, counsel elicited testimony from Cajero that there were no problems with previous pawns by petitioner. RR, vol. 4, 143-44, ECF No. 12-4. Petitioner fails to show that the witnesses would have agreed to be interviewed by counsel before trial or had any knowledge not otherwise disclosed at trial regarding the "white truck" or petitioner's pawn history. Petitioner's claim that counsel should have investigated the "circumstances of the property hearing" so as to elicit testimony that petitioner did not appear for the hearing because he was incarcerated also fails. Even if counsel had known of this fact, he could have reasonably chosen not to raise the issue for fear it would reveal to the jury that petitioner was in jail prior to trial.

In (D), (E), (F), (G), (H) and (I), petitioner claims counsel was ineffective by failing to object to: improperly

elicited testimony; an improper line of questioning; misstatements of law; and improper jury argument. Pet., Attach. 4-6, ECF No. 1. Petitioner asserts counsel should have objected to the state's question to Officer Moore regarding "who was notified" and "who appeared" at the property hearing. Petitioner argues that it was improper for the state, knowing he was incarcerated at the time, to ask the question, which "provided the jury with an impermissible inference of guilt from his failure to appear." Pet., Attach. 4, ECF No. 1. The state's question however is arguably relevant to the rightful possession, disposition and whereabouts of the stolen items at issue and, thus, proper. Petitioner also complains of the following "line of questioning" by the state with Officer Moore:

> Q. Were you able to contact Omar Caraveo through Ms. Ortega?
> A. No, I was not.
> Q. Okay. Did she provide you any information - *without telling me what it is*, did she provide you any information that confirmed in your mind that you needed to speak with Mr. Caraveo?
> A. Yes, ma'am, she did.

RR, vol. 4, 102, ECF No. 12-4 (emphasis added). Petitioner asserts that counsel should have objected because the state's question impermissibly "allowed the jury to speculate the existence of extraneous evidence which conveyed the impression

that the state knew more than it was permitted to relate in court." Pet., Attach. 4, ECF No. 1. It appears to this Court however that the prosecutor was merely attempting to word his question so as to avoid hearsay testimony. Counsel is not required to raise frivolous objections. *Johnson v. Cockrell,* 306 F.3d 249, 255 (5th Cir. 2002), *cert. denied,* 538 U.S. 926, (2003).

Petitioner next complains counsel should have objected to the state's misstatements of law. Pet., Attach. 4-5, ECF No. 1. According to petitioner, the state improperly "instructed the jury that they can 'rely on recent possession of stolen property,' and that such reliance could be 'sufficient' to 'sustain' a conviction." The record reflects that counsel did object to this argument and that the objection was overruled. RR, vol. 4, 187, ECF No. 12-4. Thus, this claim is refuted by the record.

Petitioner next claims the state improperly argued that "the jurors had to agree 'unanimously' beyond a reasonable doubt that [he] was 'not guilty' of burglary of a habitation before it could 'consider' the lesser-included offense of theft," thus shifting the burden to the defense. Pet., Attach. 5, ECF No. 1. The jury was charged on the issues as follows:

> Now, if you find from the evidence beyond a reasonable doubt that . . . the defendant . . . did then and there intentionally and knowingly, without the effective consent of Carol Parish [or Rebecca Smith], the owner thereof, enter a habitation with intent to commit theft and therein committed theft, then you will find the defendant guilty of the offense of burglary of a habitation as charged in the indictment.
>
> Unless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "not guilty" *and shall then proceed to deliberate on the hereinafter described offense of theft of less than $50*.

Clerk's R. for CR08-0502, 57, ECF No. 12-3 (emphasis added); Clerk R. for CR08-0503, 39, ECF No. 11-8 (emphasis added). Petitioner's claim has been considered and rejected by the Texas Court of Criminal Appeals in *Barrios v. State*, 283 S.W.3d 348, 352-53 (Tex. Crim. App. 2009). As a matter of state law, such an instruction, although not favored, is permissible. Thus, the state's argument appears to be merely an attempt to explain the instruction. As previously noted, counsel is not required to make frivolous objections. *Johnson*, 306 F.3d at 255.

Finally, petitioner claims counsel should have objected to the state's improper jury argument suggesting that he was a "proficient thief" and argument that he failed to call witnesses to testify on his behalf regarding his whereabouts at the time of the burglaries. Pet., Attach. 5, ECF No. 1. As to the first

claim, read in context, it appears the state was merely explaining the purpose of the "unexplained possession of recently stolen property" rule. RR, vol. 5, 187, ECF No. 12-4. A prosecutor may properly discuss properly admitted evidence and any reasonable inferences or conclusions that can be drawn from that evidence. *Virginia v. Black,* 538 U.S. 343, 397 n.3 (2003); *United States v. Meza,* 701 F.3d 411, 430 (5th Cir. 2012); *Russell v. State,* 290 S.W.3d 387, 393 (Tex. App.-Beaumont 2009, no pet.). Accordingly, the argument was not objectionable. As to the second claim, counsel did raise an objection and the objection was overruled by the trial court. RR, vol. 4, 185, ECF No. 12-4. Thus, the claim is refuted by the record.

In (J), petitioner asserts that counsel would not accept his collect calls and only communicated with him from October 2008 through February 2009 *via* three letters, that counsel failed to discuss the specifics of the case with him, that counsel failed to put forth a real effort to become acquainted with the facts of his case, and that counsel's visits to him in jail were short, fruitless, and "devoid of any meaningful transfer of information which could have aided the defense." Pet., Attach. 6, ECF No. 1. Petitioner fails to assert, however, that further consultation would have enabled counsel to develop additional evidence or

defenses. "[B]revity of consultation time between a defendant and his counsel, alone, cannot support a claim of ineffective assistance of counsel." *Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984).

Lastly, in (K), petitioner claims counsel was ineffective during the punishment phase by failing to obtain and advance mitigating evidence in the form of a videotape depicting the true events of an incident in which a Wal-Mart theft-prevention officer, Jeff Key, attempted to detain petitioner for suspicion of theft. Key testified at trial that petitioner pulled a box cutter and took a swing at his face during the incident, which petitioner disputes. RR, vol. 6, 53, ECF No. 12-4. Petitioner asserts that a videotape from the store's surveillance camera exists and controverts the officer's version of events. Pet., Attach. 6-7, ECF No. 1. It does not appear, however, that the videotape was provided to the state courts and is not provided here. Conclusory allegations in support of an ineffective-assistance claim are insufficient to raise a constitutional issue. *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1998).

In conclusion, assuming the state courts applied the *Strickland* standard, it appears the state courts applied it in a

reasonable manner. Petitioner has failed to rebut the presumption of competence mandated by *Strickland,* much less demonstrate how he suffered any prejudice as a result of counsel's acts or omissions.

Prosecutorial Misconduct

Under his seventh ground, petitioner raises eight prosecutorial-misconduct claims. Pet., Attach. 7-8, ECF No. 1. These claims largely echo petitioner's ineffective-assistance-of-counsel claims and are simply re-packaged as prosecutorial-misconduct claims, save for (G). Specifically, petitioner asserts the prosecutor (A) improperly elicited testimony; (B) engaged in an improper line of questioning; (C) and (D) misstated the law; (E) and (F) used improper jury argument; and (G) failed to comply with article 37.07, §3(g). He also asserts the cumulative effect of the prosecution's misconduct deprived him of a fair trial.

Petitioner asserts the prosecution improperly questioned Officer Moore regarding who appeared for the "property hearing." Because he was incarcerated and unable to appear, petitioner asserts the state used the testimony that he did not appear to imply to the jury that he "purposefully avoided going to the hearing, thus providing the jury with an impermissible inference

of guilt." Pet., Attach. 7, ECF No. 1. As previously noted, the question appears relevant, and thus proper, regarding the rightful possession, distribution and whereabouts of the stolen items at issue in this case, and petitioner cites no legal authority that "the circumstances surrounding" the property hearing were inadmissible in his criminal trial. Even assuming the question was improper, petitioner does not explain whether or how the question materially affected the jury's verdict. In light the evidence, *in toto,* it cannot be said that the fact that petitioner did not attend the property hearing so infected the proceedings with unfairness as to make petitioner's convictions a denial of due process. *Parker v. Matthews,* 132 S. Ct. 2148, 2153 (2012).

Petitioner asserts the prosecution used an "improper line of questioning" when questioning Officer Moore:

> Q. Were you able to contact Omar Caraveo through Ms. Ortega?
> A. No, I was not.
> Q. Okay. Did she provide you any information - *without telling me what it is*, did she provide you any information that confirmed in your mind that you needed to speak with Mr. Caraveo?
> A. Yes, ma'am, she did.

RR, vol. 4, 102, ECF No. 12-4 (emphasis added). Petitioner argues that this questioning was improper because "it allowed the

jury to speculate the existence of extraneous evidence which conveyed the impression that the State knew more than it was permitted to relate in court." Pet., Attach. 7, ECF No. 1. As noted above, it appears to this Court to be more an attempt by the prosecutor to prevent Officer Moore from testifying to inadmissible hearsay. This claim is without merit.

Petitioner asserts that the prosecution misstated the law by, first, "instructing the jury that they could 'rely' on Caraveo's 'possession of recently stolen property' to be 'sufficient' evidence to 'sustain' a burglary of a habitation conviction." Pet., Attach. 8, ECF No. 1. State law allows an inference of guilt where a defendant is found in possession of recently stolen property, without a reasonable explanation. *Hardesty v. State*, 656 S.W.2d 73, 76 (Tex. Crim. App. 1983). Although it may not be sufficient proof alone, it is a circumstance to can be considered by a factfinder. *McKibben v. State*, 687 S.W.2d 513, 516-17 (Tex. App.-Houston [14th Dist.] 1985, no pet.). Here, the state emphasized to the jury that the case was a circumstantial-evidence case, and the argument explains the permissible inference to be made as a result of petitioner's unexplained possession of recently stolen items but does not rely solely on that evidence. The state encouraged the

jury to evaluate the "case independently on everything that the state has brought to you . . .." RR, vol. 4, 188, ECF No. 12-4. The sum total of the surrounding additional facts and incriminating circumstances warrant the jury's conclusion of guilt.

Petitioner also asserts that the prosecution improperly argued that the jurors "had to agree 'unanimously" beyond a reasonable doubt that Caraveo was 'not guilty of burglary of a habitation, before it could 'consider' the lesser-included offense of theft." As previously noted, the jury was charged accordingly to state law and the argument appears to be merely an attempt to explain the instruction. Thus, the argument was not improper.

Finally, petitioner asserts the prosecution's jury argument that he was a "proficient thief" was improper because such evidence was not "on the record" and it implied that he had previously been involved in criminal proceedings. Pet., Attach. 8, ECF No. 1. As previously noted, read in context, it appears the state was merely explaining the purpose of the "unexplained possession of recently stolen property" rule. RR, vol. 5, 187, ECF No. 12-4. A prosecutor may properly discuss properly admitted evidence and any reasonable inferences or conclusions

that can be drawn from that evidence; thus, this argument was permissible. *Black,* 538 U.S. at 397 n.3.

Petitioner also asserts the prosecution's "comment as to his failure to call witnesses to provide favorable testimony regarding [his whereabouts on] the days the burglaries occurred" was improper. *Id.* Arguably, this argument summarizes the state of the evidence or was a response to petitioner's argument that there was no evidence tying him to the burglaries. In either event, the argument is permissible under state law. *Borjan v. State,* 787 S.W.2d 53, 55 (Tex. Crim. App. 1990) (providing proper areas for closing argument to the jury are a summary of the evidence, reasonable deductions from the evidence, a response to opposing counsel's argument, and pleas for law enforcement). Moreover, even if the comment was improper, any potential harm was cured by the trial court's instruction to the jury that petitioner was presumed to be innocent and was not required to prove his innocence or to produce any evidence at all. *See United States v. Iredia,* 866 F.2d 114, 117-18 (5th Cir. 1989) (holding that prosecutor's comment-"if there was . . . evidence available to defense lawyers don't you think they would put it on"-did not require reversal, because district court's instruction-that burden was on the government-"should have

sufficiently erased any doubts as to which party had the burden of proof").

Finally, petitioner asserts the prosecution failed to meet the notice requirements set out in article 37.07, § 3(g) of the Texas Code of Criminal Procedure with regard to introduction of unadjudicated, extraneous offenses during the punishment phase. Pet., Attach. 8, ECF No. 1. He asserts notice regarding his pending aggravated-robbery offense was deficient because it did not specify the name of the victim or give a correct date of the offense. Under Texas law, the state is required to provide "reasonable notice" of its intent "to introduce an extraneous crime or bad act that has not resulted in a final conviction in a court of record or a probated or suspended sentence[.]" TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g) (West Supp. 2014); TEX. R. EVID. 404(b) ("reasonable notice" of intent to use extraneous offense evidence must be given before trial). "[N]otice of that intent is reasonable only if the notice includes the date on which and the county in which the alleged crime or bad act occurred and the name of the alleged victim of the crime or bad act." *Id.* At the outset of the punishment phase, the trial court overruled petitioner's objections to the state's notice. RR, vol. 5, 7-10, ECF No. 12-4. This claim presents a question of state law, which

has been resolved by the state courts. Errors of state law are not cognizable on federal habeas review. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, law, or treaties of the United States.").

Trial Court Error

Petitioner also claims the trial court abused its discretion by allowing the state to introduce evidence of his pending aggravated-robbery offense, over his timely objection. The state appellate court, relying solely on state law, addressed this claim as follows:

> The State called Jeff Kay as a witness during the punishment phase to testify about an encounter between him and appellant occurring on January 8, 2008, at a Wal-Mart in Fort Worth. Appellant requested the trial court to conduct a hearing outside of the jury's presence prior to Kay's testimony so that the court could determine if his testimony was admissible pursuant to Tex. Code Crim. Proc. Ann. art. 37.07. The trial court denied appellant's request. Kay subsequently testified that he is an asset protection associate for Wal-Mart. He testified that he observed appellant conceal a car amplifier and a watch and then leave the store without paying for the items. He additionally testified that appellant took a swipe at his face with a box cutter when Kay confronted appellant as he was leaving the store.
>
> A trial court's decision to admit extraneous offense evidence during the punishment phase is reviewed under an abuse of discretion standard. The trial court's decision will not be overturned unless it

is found to be outside the zone of reasonable disagreement. Extraneous offense evidence may be offered during the sentencing phase to assist the jury in determining punishment and is admissible "as to any matter the court deems relevant to sentencing, including but not limited to . . . evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant."

Article 37.07 does not require a trial court to conduct a hearing outside the jury's presence to determine the admissibility of extraneous offenses during the punishment phase. The trial court must determine the threshold issue of admissibility by determining whether the extraneous offense is relevant. After the trial court finds the extraneous evidence relevant, the jury, as the factfinder, must then determine whether the State has satisfied its burden to prove the extraneous acts beyond a reasonable doubt.

When appellant requested a preliminary hearing to determine the admissibility of Kay's testimony, appellant's counsel specifically stated that the purpose of the hearing would be "to make sure that such evidence meets the beyond a reasonable doubt standard of proving unadjudicated offenses." As noted in *Mitchell*, this is a function for the jury to perform rather than a threshold issue of admissibility for the trial court to resolve. Accordingly, the trial court did not abuse its discretion in overruling appellant's request to conduct a preliminary examination of Kay under Article 37 .07. In this regard, there was information before the trial court for it to determine that Kay's anticipated testimony about an unadjudicated offense involving appellant was relevant to punishment. Furthermore, even if the trial court erred, there was no harm. Appellant does not argue that the State failed to prove the offenses beyond a reasonable doubt, and Kay's testimony identifying appellant as the perpetrator of the unadjudicated offense was unequivocal.

Mem. Op., 4-5, ECF No. 11-11 (citations omitted).[3]

Again, this claim is strictly a question of state law, which has been resolved by the state courts. Such a claim is not cognizable on federal habeas review. It is not the role of a federal habeas court to review the state courts' interpretation of its own rules. *Charles v. Thaler*, 629 F.3d 494, 500 (5th Cir. 2011).

V. Summary

In summary, the record supports the state courts' denial of the claims presented in this federal habeas proceeding. The state courts' adjudication of the claims is not contrary to or involve an unreasonable application of clearly established federal law, as determined by the Supreme Court, in light of the record as a whole. Accordingly, it is entitled to deference and the presumption of correctness.

For the reasons discussed herein,

The Court ORDERS the petition of Petitioner for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be, and is hereby, denied. The Court further ORDERS that a certificate of

[3]The appellate court's opinion reflects the Wal-Mart's assert-protection associate's name as Jeff Kay, however his correct name is Jeff Key. RR, vol. 6, 26, ECF No. 12-4.

appealability be, and is hereby, denied.

SIGNED May _____, 2015.

JOHN MCBRYDE
UNITED STATES DISTRICT JUDGE